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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 MACJHAY YAGAO,

11 Plaintiff,

12 v.

13 JOHN WEAVER, Warden,

14 Defendant.

CASE NO. 15cv2554-WQH-JLB

ORDER

HAYES, Judge:

15 On November 1, 2015, Petitioner Macjhay Yagao commenced this action by
16 filing a Petition for Writ of Habeas Corpus. (ECF No. 1). On December 17, 2015,
17 Petitioner filed an Amended Petition for Writ of Habeas Corpus challenging his San
18 Diego Superior Court conviction for the transportation of more than 28.5 grams of
19 marijuana in violation of California Health and Safety Code section 11360(c). (ECF
20 No. 6). On December 9, 2016, Petitioner filed a motion for stay and abeyance. (ECF
21 No. 34).

22 On July 7, 2017, the United States Magistrate Judge issued a Report and
23 Recommendation recommending this Court deny the Amended Petition and the motion
24 for stay and abeyance. (ECF No. 37). On July 28, 2017, Petitioner filed objections to
25 the Report and Recommendation. (ECF No. 38).

26 On August 29, 2017, the Court adopted the Report and Recommendation in its
27 entirety, denied the Amended Petition, denied the motion for stay and abeyance, and
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1 granted a certificate of appealability.¹ (ECF No. 39). A Clerk’s Judgment was issued.
2 (ECF No. 40).

3 On September 25, 2017, the Petitioner filed a document in the United States
4 Court of Appeals for the Ninth Circuit which included a notice of appeal, a motion for
5 pro bono counsel, and a motion to proceed in forma pauperis. (ECF No. 41).

6 Parties filing appeals to the United States Court of Appeals for the Ninth Circuit
7 are required to pay a filing fee. *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir.
8 1999). An action may proceed despite a party’s failure to pay only if the party is
9 granted leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a). *Id.* “To
10 proceed in forma pauperis is a privilege not a right.” *Smart v. Heinze*, 347 F.2d 114,
11 116 (9th Cir. 1965). Pursuant to Federal Rule of Appellate Procedure 24, “a party to
12 a district court action who wishes to appeal in forma pauperis must file a motion in the
13 district court.” Fed. R. App. P. 24(a)(1). “The party must attach an affidavit that ...
14 shows in the detail prescribed by Form 4 of the Appendix of Forms the party’s inability
15 to pay or to give security for fees and costs....” Fed. R. App. P. 24(a)(1)(A). Federal
16 Rule of Appellate Procedure 24 further provides:

17 A party who was permitted to proceed in forma pauperis in the district-
18 court action . . . may proceed on appeal in forma pauperis without further
19 authorization . . . unless (A) the district court . . . certifies that the appeal
20 is not taken in good faith or finds that the party is not otherwise entitled
21 to proceed in forma pauperis and states in writing its reasons for the
22 certification or finding; or (B) a statute provides otherwise.

23 Fed. R. App. P. 24(a)(3).² “An appeal may not be taken in forma pauperis if the trial
24 court certifies in writing that it is not taken in good faith.” 28 U.S.C. § 1915(a)(3). In
25 the Ninth Circuit, “good faith” means that “at least one issue or claim is found to be
26 non-frivolous.” *Hooker v. Am. Airlines*, 302 F.3d 1091, 1092 (9th Cir. 2002). An

25 ¹ On October 4, 2017, the Court of Appeals remanded this case to this Court for
26 the limited purpose of issuing a modified certificate of appealability which specifies
27 which issues satisfy the standards set forth in 28 U.S.C. § 2253(c).

28 ² Petitioner was not permitted to proceed in forma pauperis in the district court.
This Court denied a motion to proceed in forma pauperis (ECF No. 5) and the action
proceeded in district court only after Petitioner paid the applicable filing fee. (ECF No.
7).

1 action is “frivolous” for purposes of section 1915 if it lacks any arguable basis in law
2 or fact. *Neitzke v. Williams*, 490 U.S. 319, 325, 327 (1989); *Franklin v. Murphy*, 745
3 F.2d 1221, 1225 (9th Cir. 1984).

4 In support of his motion to proceed in forma pauperis, Petitioner asserts only the
5 following: “Petitioner also moves the Court to proceed in forma pauperis because he
6 is an indigent detainee and unable to pay for the Court’s fees.” (ECF No. 41 at 1).
7 Petitioner has not provided the Court with any financial information in connection with
8 this motion and has not attached in affidavit which “shows in the detail prescribed by
9 Form 4 of the Appendix of Forms the party’s inability to pay or give security for fees
10 and costs” as required by Federal Rule of Appellate Procedure 24(a). Petitioner has
11 failed to provide the Court with any information upon which it can conclude that
12 Petitioner is unable to afford the costs of these proceedings.

13 IT IS HEREBY ORDERED that the motion to proceed in forma pauperis on
14 appeal is DENIED. (ECF No. 42) .

15 DATED: October 18, 2017

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17 **WILLIAM Q. HAYES**
18 United States District Judge
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